



February 4, 2003

Ms. Marlene H. Dortch  
Federal Communications Commission  
445 12th Street, S.W., Room 1-A836  
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation in CC Docket No. 01-338

Dear Ms. Dortch:

Pursuant to Sections 1.1206(b)(2) of the Commission's Rules, this letter is to provide notice in the above-captioned docketed proceedings of an ex parte meeting on January 30 and 31, 2003, by Jonathan Askin of the Association for Local Telecommunications Services (ALTS), Julia Strow of Cbeyond Communications, John Heitmann and Steve Augustino of Kelley Drye (for NuVox), and Patrick Donovan of Swidler Berlin (for Cbeyond). The Parties met separately with Bill Maher, Jeff Carlisle, Rich Lerner, Michelle Carey, Brent Olson, Tom Navin, Jeremy Miller, and Julie Veach of the Wireline Competition Bureau and Chris Killion of the Office of the General Counsel. In a separate meeting on February 4, 2003, Jonathan Askin, John Heitmann of Kelley Drye, Thomas Jones of Willkie Farr, Patrick Donovan of Swidler Berlin, and Steve Crawford of El Paso Global Networks met with John Rogovin, Debra Weiner, and Chris Killion of the Office of the General Counsel along with Jeremy Miller of the Wireline Competition Bureau.

The Parties focused primarily on the problems caused by imposition of use restrictions or eligibility criteria on CLEC access to enhanced extended links (EELs). The Parties noted the logistical nightmare of having to police, monitor, measure and audit end user traffic. Most CLECs do not and, due to their technology, often cannot measure breakdown between LEC services and interexchange services. Thus, monitoring and policing is impractical, if not impossible. Furthermore, such an approach allows too much room for ILEC gaming and prejudging of circuit eligibility and would add such a layer of uncertainty that it effectively precludes many CLEC from even attempting to order EELs. Such action would put such a cloud of uncertainty over the whole CLEC business that this action alone would, at a minimum drive CLECs up market and small business customers would be left with whatever monopoly priced services the ILEC decides to offer and no affordable competitive service offerings. The parties argued that, if the policy objective is to protect the ILEC imbedded base of special access revenue (as expressed in the EEL Clarification Order), that alleged problem is resolved by tying use restrictions only to special access to EEL conversions by the largest users of ILEC special access – the large long distance carriers – not by going down the slippery slope of compelling the smaller CLECs to satisfy onerous restrictions for special access conversions let alone having to satisfy such restrictions for new combinations. The additional administrative layer would harm only the transmission UNE-reliant CLECs and their customers and would-be customers desiring affordable, innovative alternatives to ILEC offerings. Additionally, the Parties have repeatedly stressed that EELs must be made available for the delivery of pure data services. The problem that the FCC had intended to fix was a massive conversion of IXC special access to EELs, thereby causing an immediate dramatic revenue reduction for the ILECs. The better solution to deal with the FCC-perceived problem is to impose special access –to-EEL use restrictions only on the largest carriers that purchase the lion's share of ILEC special access. To this end, the Parties offered, for discussion purposes only, the attached two-tiered approach to ensure that typical facilities-based CLECs will no longer be broadly precluded from EEL access, while the largest IXCs may have to demonstrate that they are providing more than a de minimis amount of LEC services to customers served by circuits they seek to convert. After

discussion with FCC staff, we have determined, however, that the concept is over-inclusive and would unfairly and unnecessarily preclude small, bona fide CLECs that happen to have a stand-alone long distance product from obtaining EELs, unfettered by burdensome restrictions that do not serve to resolve the perceived problem of precluding IXCs from converting their massive embedded base of special access circuits to EELs.

If you have any questions about this matter, please contact me at 202-969-2587.

Respectfully submitted,

/s/

Jonathan Askin

FROM THE DESK OF:  
Jonathan Askin  
General Counsel  
(202) 969-2587  
E-mail [jaskin@alts.org](mailto:jaskin@alts.org)

***THE FOLLOWING IS NOT ENDORSED BY THE PARTIES  
AND WAS INTENDED FOR DISCUSSION PURPOSES ONLY***

**EEL CLEC Eligibility Criteria and IXC Safe Harbors**

FCC Rule: EELs may not be used exclusively for interexchange services.

FCC Goals:

- (1) Ensure that facilities-based CLECs have access to EELs without unnecessary and unanticipated restrictions and burdens created by the current restrictions.
- (2) Ensure that IXCs are not able to convert embedded special access base by adding a de minimis amount of LEC services<sup>1</sup> on end user circuits.

CLEC Goals: Work within FCC frameworks to craft gating mechanisms that reduce opportunities for IXC and ILEC gaming by focusing on the two goals set forth above.

Two-Tier Framework for EELs<sup>2</sup>:

- (1) Eligibility criteria for facilities-based CLECs
  1. collocation or reverse collocation in the LATA
  2. interconnection trunks in the LATA (if carrier provides local voice service)
  3. CLEC certification and common carrier service offerings in the LATA
  - \* pre-certification requirement
  - \* no audits
  - \* no commingling restrictions
  - \* FCC and state commission enforcement options available
- (2) Modified “Safe Harbors” for IXCs with stand-alone retail IXC offerings<sup>3</sup>  
(for DS1 and higher level EELs)
  1. circuit terminates to a collocation or reverse collocation, exclusive provider of LEC services at time of conversion and that it will notify ILEC when and if it no longer provides LEC services to the customer
  2. circuit terminates to a collocation or reverse collocation, loop facility carries on average at least 10% LEC service traffic
  3. loop facility carries on average at least 33% LEC service traffic
  - \* pre-certification requirement
  - \* limited audits<sup>4</sup>
  - \* no commingling restrictions
  - \* expedited waiver procedure available (see note 1)
  - \* FCC and state commission enforcement options available

---

<sup>1</sup> FCC and its Enforcement Bureau to determine what constitutes a de minimis amount of LEC services. Such determinations should be made on a case-by-case basis and may take into account measurement issues, product mix and other factors.

<sup>2</sup> Wholesalers must certify that their carrier customer meets the tier 1 or tier 2 criteria, whichever is applicable.

<sup>3</sup> Stand-alone retail IXC offerings are dedicated interexchange voice services offered separate from a bundle of services that include LEC services (local voice, exchange access, internet access and point-to-point local data) or stand-alone LEC service offerings.

<sup>4</sup> Such audits must (a) be triggered by a probable cause standard – a demonstrable and rationally related concern regarding compliance – no random or routine audits; (b) be conducted by an AICPA-compliant independent third party auditor acceptable to both parties; (c) not require burdensome production or record keeping; (d) be limited to once in a twelve month period - barring finding of more than de minimis (>10%) non-compliance (which would justify a one audit per six month period standard until an audit uncovered no more than de minimis (>10%) non-compliance); (e) be paid for by the ILEC – with cost shifting on a pro-rata basis, if certain circuits are found to be ineligible; (f) be subject to state PUC or FCC review, per the request of either party, prior to any true-up or switch to SPA rates.